United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

ORIGINAL

77-6190

United States Court of Appeals
FOR THE SECOND CIRCUIT

B/P/S

In the Matter
of the
Complaint of Tug OCEAN PRINCE, INC., and RED STAR TOWING & TRANSPORTATION CO., as Owner and Charterer of the Tug "OCEAN PRINCE", for Exoneration from or Limition of Liability,

Plaintiffs-Third-Party Plaintiffs-Appellees-Cross-Appellants,

against

UNITED STATES OF AMERICA,

Third-Party Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF OF CROSS-APPELLANTS TUG OCEAN PRINCE, INC. AND RED STAR TOWING & TRANSPORTATION COMPANY

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TABLE OF CONTENTS

	PAGE
Statement of the Issues Presented for Review	1
Statement of the Case	3
Statement of Facts	5
1. The Grounding	5
2. Coast Guard Rock	7
3. The Issues	8
Summary of Argument	9
POINT I—The Government was negligent in continuing to maintain only a black can buoy to mark the rock obstruction despite the known inadequacy of the buoy and the availability of more effective aids to navigation	11
POINT II—The Government's failure to maintain a more effective land-based aid to navigation was a proximate cause of the grounding	29
Conclusion	37
Addendum—Chart	38

TABLE OF AUTHORITIES

Cases:

Afran Transport Co. v. *United States,* 309 F.Supp. 650 (S.D.N.Y. 1969), aff'd 435 F.2d 213 (2d Cir. 1970), cert. denied 404 U.S. 872 (1971) 18, 19, 36

American Smelting & Refining Co. v. *S.S. Irish Spruce,* 548 F.2d 56 (2d Cir. 1977), cert. denied —— U.S. —— (1977) 31, 35

PAGE

American Zinc Co. v. *Foster*, 313 F.Supp. 671 (S.D. Miss. 1970), mod. on other grounds 441 F.2d 1100 (5th Cir. 1971), cert. denied 404 U.S. 855 .....19, 20

Bouchard Transp. Co. v. *Moran Towing & Transp. Co.*, 428 F.Supp. 153 (S.D.N.Y. 1977) 36

Burgess v. *The Tamano*, 373 F.Supp. 839 (D. Me. 1974), rev'd on other grounds, 564 F.2d 964 (1st Cir. 1977) 10

Canadian Pacific (Bermuda) Ltd. v. *United States*, 534 F.2d 1165 (5th Cir. 1976) 22

Complaint of Tug Helen B. Moran, Inc., 560 F.2d 527 (2d Cir. 1977) 30

Greer v. *United States*, 505 F.2d 90 (5th Cir. 1975) ..20, 21

Guinan v. *Boston, Cape Cod & New York Canal Co.*, 1 F.2d 239 (2d Cir. 1924) 23

Humble Oil & Ref. Co. v. *Tug Crochet*, 422 F.2d 602 (5th Cir. 1970) 21, 22

In re Seaboard Shipping Corp., 449 F.2d 132 (2d Cir. 1971), cert. denied 406 U.S. 949 (1972) 11

Indian Towing Co. v. *United States*, 350 U.S. 61 (1955) 18, 20

Richmond Marine Panama S.A. v. *United States*, 350 F.Supp. 1210 (S.D.N.Y. 1972) 18

Russell, Poling & Co. v. *Conners Standard Marine Corp.*, 252 F.2d 167 (2d Cir. 1958) 13, 14, 19

Somerset Seafood Co. v. *United States*, 193 F.2d 631 (4th Cir. 1951) 18

Trinidad Corp. v. *S.S. Sister Katingo*, 230 F.Supp. 976 (S.D.N.Y. 1967) 19

PAGE

United States v. *Reliable Transfer Co., Inc.*, 421 U.S. 397 (1975) 10

Universe Tankships, Inc. v. *United States*, 336 F. Supp. 282 (E.D. Pa. 1972) 18, 20

Statutes:

14 U.S.C. § 81 17

46 U.S.C. § 183 (Limitation of Liability Act) ....10 (note)

46 U.S.C. § 742 (Suits in Admiralty Act) 22

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Complaint of Tug Ocean Prince, Inc., and Red Star Towing & Transportation Co., as Owner and Charterer of the Tug "Ocean Prince", for Exoneration from or Limition of Liability,

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On Appeal from the United States District Court for the Southern District of New York

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BRIEF OF CROSS-APPELLANTS TUG OCEAN PRINCE, INC. AND RED STAR TOWING & TRANSPORTATION COMPANY

Statement of the Issues Presented for Review

Having found that the obscuring of the black can buoy "25" by ice was a contributing cause of the grounding of the Barge New London in the Hudson River while in tow of the Tug Ocean Prince, that buoy "25" was established and maintained by the Coast Guard as an aid to navigation to mark a dangerous rock obstruction, that the rock obstruction is located in an area of the River which is es-

pecially susceptible to ice accumulations and that the can buoy is frequently covered by ice so that it is not visible to navigators, that there had been at least two previous major groundings occurring under similar circumstances at the same location as the result of ice covering the can buoy, that in light of the inadequacy of the can buoy there were available other more effective navigational aids which could have been established to mark the rock obstruction, and that the Coast Guard had knowledge of all the foregoing prior to the grounding of the Barge NEW LONDON, did the District Court, in dismissing the claims of cross-appellants Tug Ocean Prince, Inc. and Red Star Towing & Transportation Company, as owner and charterer of the Tug OCEAN PRINCE, against cross-appellee the United States of America ("Government") for contribution or indemnity for damages sustained by the Barge NEW LONDON, err:

1. In holding that the Government exercised due care in continuing to maintain the black can buoy to mark the rock obstruction, despite its known inadequacy and the availability of more effective land-based stationary aids, and

2. In holding that the Government's failure to maintain a more effective land-based available aid to navigation was not a proximate cause of the casualty?

Statement of the Case

On February 3, 1974, the Barge NEW LONDON went aground in the Hudson River at the rock obstruction marked by can buoy "25" while in tow of the Tug OCEAN PRINCE. Following the grounding, cross-appellants Tug Ocean Prince, Inc. and Red Star Towing & Transportation Company (hereinafter referred to collectively as "Red Star"),[1] as owner and charterer respectively of the Tug

[1] Referred to in the District Court's Memorandum Opinion as "Plaintiffs".

OCEAN PRINCE, commenced this action for exoneration from or limitation of liability on August 2, 1974 in the United States District Court for the Southern District of New York. A Claim was filed in the action by Pittston Marine Transport Corporation (hereinafter "Pittston"), as owner of the Barge NEW LONDON, for damage to the Barge and her cargo of fuel oil. Red Star impleaded the Government for contribution or indemnity for Pittston's damages. Pittston in turn filed a cross-claim against the Government for damages sustained by the Barge and her cargo.

On November 18, 1975, the Government commenced a related action against Red Star and Pittston in the United States District Court for the Southern District of New York to recover pollution removal expenses allegedly incurred as the result of an oil spill which followed the grounding. The Government's action was consolidated with Red Star's limitation of liability action for purposes of pre-trial discovery and trial.

A trial was held on May 3-12, 1977, the Honorable Gerard L. Goettel, D.J. presiding. Fifteen witnesses testified at the trial, including experts on navigation in the Hudson River and Coast Guard officers, and deposition transcripts and numerous documents were accepted in evidence. All damage issues were reserved for a later determination.

On September 6, 1977, the District Court issued its Memorandum Opinion and Order (8a),[2] reported at 436 F.Supp. 907 (S.D.N.Y. 1977), which was entered on September 12, 1977. The District Court concluded that "the proximate and predominant causes of the grounding were errors in navigation" on the part of Mate Walter Reimer, who was navigating the Tug at the time of the grounding. The Court below held further that these

[2] All references are to the Appendix unless otherwise indicated.

errors were in turn the result of an error in management on board the Tug, whereby Mate Reimer failed to request assistance from Captain John Kiernan immediately prior to the grounding. While finding that the obscuring of the can buoy contributed to the grounding, the Court held that the Government's continued use of the buoy was not negligent.

Accordingly, in the limitation of liability action, the District Court (1) held that Red Star is not entitled to exoneration from liability, but is entitled to limit its liability to Pittston to the value of the Tug OCEAN PRINCE and the amount of her pending freight immediately after the casualty, and (2) dismissed Red Star's and Pittston's claims against the Government with respect to damages sustained by the Barge NEW LONDON.

In the Government's action, the District Court (1) dismissed the Government's claim for the recovery of oil spill removal expenses against Pittston, (2) held that Red Star is liable to the Government for oil spill clean-up costs not to exceed $19,800 ($100 per ton of the Tug's gross tonnage), (3) remanded to the Coast Guard a pollution fine assessed against Pittston, and (4) dismissed Pittston's claim against Red Star for indemnity for the pollution fine.

Pittston has appealed from the District Court's holding in the limitation of liability action that Red Star is entitled to limitation of liability. Red Star has commenced this cross-appeal to obtain a reversal of the District Court's dismissal in the limitation of liability action of its claim against the Government for contribution or indemnity for damages sustained by Pittston.[3]

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[3] The Government has filed a separate appeal (77-6195) from rulings adverse to it in its action for the recovery of oil spill removal expenses.

Statement of Facts

1. The Grounding

On February 2, 1974, the Tug OCEAN PRINCE took the Barge NEW LONDON in tow at Bayonne, New Jersey for a voyage up the Hudson River to Kingston, New York. The Barge was taken in tow forward of the Tug in push-tow fashion with the bow of the Tug secured in the Barge's stern notch. The Barge was fully loaded with a cargo of fuel oil, and had a draft of about 12 feet. In its loaded condition, the Barge was low in the water with a freeboard of only two feet. The view ahead from the Tug's pilothouse was unobstructed.

When the Tug left Bayonne with the Barge in forward tow, she was manned with a full crew of six men, including two Coast Guard licensed navigators, Captain John Kiernan and Mate Walter Reimer, two deckhands, an engineer and a cook. Captain Kiernan and Mate Reimer stood alternating six-hour watches during the voyage. Kiernan stood the Captain's watch, and was in charge of the navigation during the first leg of the voyage which commenced at 1915 hours (7:15 p.m.). At 2330 hours (11:30 p.m.), Mate Reimer came to the pilothouse and relieved Kiernan of the watch. Kiernan then retired to the Captain's quarters directly behind the pilothouse. At the time, the Tug and her Tow were approaching Haverstraw, New York.

The Tug and Barge continued northbound up the Hudson River past Peekskill and approached Bear Mountain Bridge. The tide was ebbing, there was ice in the River, and visibility was about two miles with snow flurries. The Tug was proceeding at a speed of about 6 knots over the bottom. The Tug's radar was operating and in use, and a navigation chart for the area was open and in use.

Shortly after 0100 hours on February 3rd, the Tug and Barge passed under Bear Mountain Bridge. About one

and three-quarter miles north of the Bridge, a large rock formation lies in the west side of the channel. The rock is not visible from the surface of the River, and its apex is about seven feet below mean low water. The rock, which is known as "Coast Guard Rock", is a dangerous obstruction to navigation, and the Coast Guard maintains a buoy on its easterly side to mark its location as an aid to navigators. In addition, the Coast Guard maintains a lighted tower on Con Hook Island to the north of the rock to assist downbound vessels in safely passing the rock.[4]

Mate Reimer was fully aware of the location of the rock, and knew that it was marked by the black can buoy. He continued heading north past Bear Mountain Bridge, keeping his Tug and Tow east of what he believed was the centerline of the navigable channel based on his visual and radar observations of both shorelines. As the Tug passed abeam Mystery Point, a projection of the easterly shoreline located about 1 mile north of Bear Mountain Bridge, Reimer became concerned at not being able to sight visually or by radar the "25" can buoy. He was looking for the buoy because, while he had determined that he was travelling east of the centerline of the River, he knew that he would have to maneuver to starboard before reaching the buoy to make the bend north of Mystery Point and to avoid the rock obstruction on the west side of the channel. He continued searching for the buoy visually and with the radar, and turned on the Tug's powerful spotlight to illuminate the entire area. Still not sighting the buoy visually or on radar, he became very concerned and reduced the engine speed, continuing however to search for the buoy with the spotlight and radar.

Shortly afterwards the Barge's port bow struck the rock. The Barge did not strand on the rock, and remained afloat at all times. The "25" can buoy never appeared before the

[4] An excerpt of the chart covering this area is annexed to this Brief.

casualty, and the entire area was covered by rafted ice which had dragged the buoy under the ice cover.

The Barge apparently sustained damage on its bow. With the Barge still in forward tow, the Tug turned south and proceeded to the Day Line Pier at Bear Mountain State Park to tie up the Barge and to radio for assistance. As the Tug made the turn southward, Reimer sighted visually for the first time the "25" can buoy laying over on its side under the ice and only partially visible at the head of the Vessels' wake.

2. Coast Guard Rock

Based on all the evidence, the Court below correctly found that the black can buoy "25"[5] was obscured by ice at the time of the grounding, and that this condition contributed to the casualty. The unlighted black can buoy "25" is part of the aids to navigation system maintained by the Coast Guard on the Hudson River. Its purpose is to mark a dangerous rock obstruction at a difficult bend in the River. The bend is well known to the Coast Guard to be subject to especially heavy ice accumulations because of the "eddies" created below Con Hook Island during the flow of the ebb tide.

During the months April through November, the rock is marked by a larger, lighted buoy. Because of the substantial ice floe in the Hudson River in winter months and the ice accumulations below Con Hook Island, the Coast Guard replaces the lighted buoy with a smaller black can buoy during the remaining months of the year. The seasonal replacement of the lighted buoy by the can buoy is indicated in the Light List (Exh. 2; 21a), and Mate Reimer was fully aware of the location of the rock in the River and knew that it was marked by the unlighted can buoy.

[5] The buoy was formerly numbered "21", and there are frequent references to this old number in the evidence. It shall be referred to as buoy "25" throughout to avoid any confusion.

There have been at least five other major groundings at the rock since 1963, two of which involved Coast Guard vessels, and hence the name "Coast Guard Rock". All but one of these groundings occurred under circumstances virtually identical to those which resulted in the grounding of the NEW LONDON, and three of the groundings preceded it. Coast Guard records also showed that other groundings at the rock occurred prior to 1963, but contained little information concerning the earlier groundings. The Coast Guard was on notice of the groundings prior to the NEW LONDON incident. In addition, the Coast Guard was well aware that the can buoy frequently disappeared under the ice floe in winter months, and that the obscuring of the buoy was a common circumstance in all but one of the groundings which occurred since 1963.

The undisputed evidence at trial was that in view of the difficulty in keeping the can buoy visible during the winter season, there were available other land-based navigational aids which would better aid northbound mariners in staying in the channel east of the rock. These include range lights which could be installed on the eastern shore, or a red sector which could be installed on Con Hook Light located on the westerly shore. The Coast Guard, however, has not established any of these additional aids in the immediate area approaching can buoy "25".

3. The Issues

Red Star believes that the majority of the District Court's numbered findings of fact are fully supported by the Record, and should not be disturbed on this appeal. It is Red Star's position, however, that the Court below erred in dismissing its claim against the Government for contribution or indemnity for any damages Pittston may be entitled to recover from Red Star. Even if the grounding was the result of errors in navigation and management of the Tug on the part of Mate Reimer, which Red Star does not dispute on this appeal, the overriding weight of the evidence proved that the negligence of the Government in the maintenance of a known inadequate aid to navigation at the location of the grounding was also a contributing cause. The decision below should therefore be reversed on this single issue.

Summary of Argument

Red Star is entitled to contribution from the Government for at least fifty percent of Pittston's damages. The District Court found that the "proximate and predominate causes" of the grounding of the Barge NEW LONDON and the oil spill that followed were errors in the navigation and management of the Tug OCEAN PRINCE on the part of Mate Reimer (25a). While finding that the inadequacy of can buoy "25" to effectively mark the dangerous rock obstruction contributed to the grounding (25a), that the Coast Guard had actual knowledge of the inadequacy of the can buoy long before the grounding (24a, 25a, 26a), and that there were available other navigational aids which would have assisted Reimer in staying in the channel to the east of "Coast Guard Rock" (27a), the Court below nonetheless declined to hold the Government at fault.

Red Star submits that the District Court clearly erred in excusing the Government from any liability for the casualty, and that the decision below should be reversed on this single issue. Red Star does not take issue on this appeal with the District Court's conclusion that the grounding was in part caused by errors in the navigation and management of the Tug on the part of Mate Reimer. The undisputed evidence clearly shows, however, that the Government failed to exercise due care in the duty it undertook to maintain an aids to navigation system in the area of the grounding, when it marked the rock obstruction on which the NEW LONDON and others grounded with a floating can buoy, thereby engendering reliance on the part of the

mariner on an aid to navigation known to the Coast Guard to be inadequate at this location. As will be shown more fully in Point II, contrary to the District Court's alternative basis for excusing the Government from liability, the Government's negligence was a proximate cause of the grounding.

Red Star believes that the Record is sufficiently clear for this Court to determine the proportional fault of the Government. The factual circumstances which led to the grounding and which relate to the inadequacy of the can buoy and the availability of more effective land-based aids are largely undisputed. On the basis of all of the evidence, Red Star submits that the Government's negligence was at the very least equal to the errors in navigation and management of the Tug the District Court attributed to Mate Reimer. Accordingly, the Court should reverse the dismissal of Red Star's claim for contribution or indemnity, and hold that Red Star is entitled to contribution from the Government for fifty percent of Pittston's provable damages.[6] *See United States* v. *Reliable Transfer Co., Inc.*, 421 U.S. 397, 411 (1975), holding that:

> "* * * [W]here two or more parties have contributed by their fault to cause property damage in a maritime collision or stranding, liability for such damage is to be allocated among the parties proportionately to the comparative degree of their fault, and * * * liability for such damages is to be allocated equally only when the parties are equally at fault or when it is not possible fairly to measure the comparative degree of their fault."

See also Burgess v. *The Tamano*, 373 F.Supp. 839 (D. Me. 1974), *rev'd on other grounds*, 564 F.2d 964 (1st Cir. 1977);

[6] The District Court reserved the damages issue for later determination, and a trial on that issue has been deferred pending Pittston's appeal from that part of the District Court's decision holding that Red Star is entitled to limitation of liability under the Limitation of Liability Act, 46 U.S.C. § 183.

In re Seaboard Shipping Corp., 449 F.2d 132, 138-39 (2d Cir. 1971), *cert. denied* 406 U.S. 949 (1972).

Alternatively, the case should be remanded for a determination of the amount of the Government's proportional fault.

POINT I

The Government was negligent in continuing to maintain only a black can buoy to mark the rock obstruction despite the known inadequacy of the buoy and the availability of more effective aids to navigation.

Mate Reimer was unable to locate the can buoy "25" as he approached "Coast Guard Rock" despite his diligent search for it because it was under the ice floe which accumulated at that dangerous turn in the River (22a). The testimony at trial left no doubt, and the District Court properly found, that the Coast Guard was on notice that the can buoy was highly susceptible to disappearing in the ice floe that regularly forms on the rock formation south of Con Hook Island in winter months, and was not an adequate aid for northbound vessels (24a).

On direct examination, Captain Glass, who was Chief of the Coast Guard Aids to Navigation Division for the Third District[7] at the time of the grounding, testified as follows:

> "Q. Did you ever receive any information that the 25 can buoy during winter months was found on a fairly regular basis to be under the ice?
>
> Mr. Schulmeisters: Objection.
>
> The Court: Are you aware that there have been

[7] The Third Coast Guard District includes the Hudson River.

reports that buoy 25 gets inundated by ice during winter months?

The Witness: Yes, there are reports in that Sands file (Exh. 27) to that effect.

There is a report that the buoy was reported submerged during the month of March which would be during the thaw when the current would be rather high and when the tender went there, they found the buoy on station. That information comes from two successive Sands reports.

So, the buoy, the winter buoy could be disappearing just because of the periodic high current and also with the overrun of ice. Very much like the spar buoys up on the St. Lawrence River. It is a reasonable expectation." (521a, 522a)

Captain Hallock, who succeeded Captain Glass as Chief of the Aids to Navigation Division for the Third Coast Guard District, conceded that the buoy was an ineffective aid to navigation when covered under the ice floe:

"Q. Is it possible that the can buoy located at position 25 could go under the ice floes or an ice floe so that it would not be visible to passing vessels?

A. Yes.

Q. If the buoy was under the ice, would it, in your opinion, be an effective aid to navigation?

A. During the time it's under ice?

Q. Yes.

A. No." (455a)

Captain Hallock further testified that the area in question was highly susceptible to the accumulation of ice in winter months:

"Q. Is the area in the vicinity of buoy 25 susceptible to the accumulation of ice, in your opinion?

A. Oh, yes.

Q. Why?

A. Well, this is a relatively narrow portion of the river, and the ice—major directions of flow of ice, of course, would be down the river, so you would be having ice coming from up river, let alone the ice that makes up in the area of the buoy." (455a, 456a)

These facts were not disputed at trial, and were properly found by the District Court in Finding 43. (24a)

The District Court properly accepted evidence of numerous other groundings at "Coast Guard Rock" under virtually identical circumstances, both prior and subsequent to the NEW LONDON incident, which demonstrated the danger of the location resulting from the inadequacy of the can buoy. (436 F.Supp. at 921) In each instance, Coast Guard records showed that the can buoy was reported to have been submerged under the ice floe that regularly accumulates at that bend in the River. Only one year before the grounding of the NEW LONDON, on February 26, 1973, the loaded gasoline Barge GEORGE T. TILTON, while in tow of the Tug BART TURECAMO, struck the rock on a northbound voyage, causing damage to the Barge and pollution. (25a, 26a) Coast Guard records show the buoy was reported to be under the ice at the time of the grounding. (Exh. 26)

In December, 1963, the Coast Guard Cutter SAUK went aground at the rock when the can buoy was submerged in ice. (26a; see Exhs. 28, 29, 33) In investigating this casualty, the Coast Guard learned of numerous other casualties at the same rock. (26a; Exh. 33)

These prior groundings, along with reports that the buoy was frequently submerged, clearly establish that long before the Tug OCEAN PRINCE took the Barge NEW LONDON on the voyage in question, the Coast Guard was on notice that the buoy was an inadequate aid for northbound vessels in winter months, and that its ineffectiveness had resulted in major casualties. *See generally Russell, Poling*

& Co. v. *Conners Standard Marine Corp.*, 252 F.2d 167, 170 (2d Cir. 1958).

The danger to navigators resulting from the inadequacy of the can buoy was demonstrated again only two years after the NEW LONDON incident when the loaded tank Barge ROBERT L. POLING, while in tow of the Tug JOAN MORAN, went aground on the rock in January, 1976. (26a) Like the SAUK, GEORGE T. TILTON and NEW LONDON casualties, Coast Guard records for the Poling incident show that the buoy was reported to be under the ice floe at the time of the grounding. (Exh. 35)

Red Star submits that the evidence of these other groundings and of the buoy's ineffectiveness at this location in winter months when ice is on the River clearly demonstrated the need for a stationary, land-based lighted aid at that turn in the River. While Captain Glass, who was in charge of the Aids to Navigation Division at the time of the grounding, and his immediate successor, Captain Hallock, not surprisingly testified at trial that in their opinion there was no demonstrated "need" for another aid (600a, 696a), Captain Hallock admitted that there was a need for a lighted aid in winter months to assist navigators transiting the area at night:

> "Q. Can you tell me why a lighted buoy is located at this station eight months of the year?
>
> A. Well, a lighted buoy would enable them to transit at night, and we're marking what we consider to be an obstruction to navigation.
>
> * * *
>
> Q. Does not the same need according to the Coast Guard's own standards for a lighted buoy exist the remaining four months of the year when a can buoy is placed at that location? * * *
>
> A. The need for the buoy at that location does continue to exist during the winter months." (451a, 452a)

The Court below quite properly found as Finding 55 (27a) in reference to the can buoy that:

> "In light of the difficulty in keeping this floating aid to navigation visible during the winter season, there were available other navigational aids which could have been established on land which would better aid the mariner in staying in the channel."

This finding was fully supported by the testimony of the Coast Guard Aids to Navigation Chiefs, Captain Hallock and Captain Glass, who admitted that land-based aids which are not subject to the rise and fall of the seasonal ice floe could have been installed and would have better assisted northbound navigators in safely passing Coast Guard Rock than the can buoy. (458a-461a; 590a; 599a-600a; 761a-765a; 770a; 776a) Their testimony confirmed that of Red Star's expert, Captain Fraccaro, who stated that the best alternative would be a set of range lights on the eastern shore across from Coast Guard Rock, either on Sugarloaf Mountain or closer to the shore. (502a-509a)

Range lights are designed to guide the mariner in a specific direction. (460a) A range consists of two land-based lighted structures which are situated so as to be aligned with the centerline of the channel indicated by the range. By getting the structures, or at nighttime the lights from the structures, in line, the navigator can align the vessel on the range, and thereby follow it in the desired direction. In addition to this type of range, the Coast Guard utilizes single-station ranges. These consist of one structure, with two lights emitted at different angles which can be lined up just as the light from two structures would be.

Captain Glass stated without qualification that either a two-station or single station range light could be erected on the east shore, either on Sugarloaf Hill or closer to the shoreline. (590a; 599a)

In addition, there was testimony that a red sector could be established on Con Hook Light to alert northbound vessels to the location of Coast Guard Rock. (502a; 503a; 459a) At a deposition before trial, Captain Hallock gave the following testimony on these alternative aids that was read into evidence at trial:

"Q. I had two questions which were broken up. The first was whether or not you would consider it possible to * * * establish a land-based aid which would indicate the presence of rocks in that area. * * *

Q. What type of land-based aid would it be possible to establish?

A. In the case of daytime, I don't think there would be an adequate land-based aid that would assist or be able to specify that rock was in that particular area.

Q. How about in the case of nighttime?

A. Nighttime, then it would be possible.

Q. What type of aid could be established?

A. The aid we would most commonly use would be what we call a sectorized light.

Q. Can you describe what a sectorized light is?

A. This is an all-round light, in other words, 360 degrees. If it were a white light, we would sectorize that light in the direction of where this obstruction or menace to navigation was, for instance, with a red sector; that's the most common way that we would accomplish that.

Q. I see. Has your office ever considered this possibility for the buoy 25 area?

A. Not to my knowledge. * * *

Q. My question is could a range be established which would indicate to mariners the location of good, safe water in the area of buoy 25?

A. Yes, a range could be established.

Q. Has the Coast Guard ever considered this possibility, to your knowledge?

A. To my knowledge, no." (458a-461a)

At trial, Captain Hallock acknowledged his earlier testimony, and stated:

"Q. Captain, you recall that you testified earlier at a deposition and more particularly, on December 16, 1976?

A. Yes.

Q. At that point you were asked a question whether it was possible to put a sector light on Con Hook Island and I believe your response was yes, that it was possible.

Captain, my question to you now is, would it, in your opinion, be helpful to put a sector light on Con Hook Island?

A. Yes, I think it would.

Q. Do you think it is a practical solution? Do you think a sector light would help navigation in that area?

A. Yes.

The Court: In which direction?

The Witness: Upbound and possibly downbound.

Q. Why has there been no sector light put in there, if you know?

A. I couldn't answer that question.

Q. Would you now consider putting a sector light there?

A. Yes." (760a-761a)

Buoy "25" is an aid to navigation established, maintained and operated by the Coast Guard pursuant to its statutory authority under 14 U.S.C. § 81. Con Hook Light, located 0.3 miles north of Coast Guard Rock, was also designed to assist navigators in avoiding the obstruction, but is primarily intended to aid southbound vessels, as the description in the Coast Pilot (Exh. 3) clearly indicates. (24a)

The leading case concerning the Coast Guard's duty with respect to the maintenance of aids to navigation it has

undertaken to establish is *Indian Towing Co.* v. *United States,* 350 U.S. 61, 69 (1955). There the Court stated:

> "The Coast Guard need not undertake the lighthouse service. But once it exercised its discretion to operate a light on Chandeleur Island and engendered reliance on the guidance afforded by the light, it was obligated to use due care to make certain that the light was kept in good working order; and if the light did become extinguished, then the Coast Guard was further obligated to use due care to discover this fact and to repair the light or give warning that it was not functioning. If the Coast Guard failed in its duty and damage was thereby caused to petitioners, the United States is liable under the Tort Claims Act."

See generally Afran Transport Co. v. *United States,* 309 F.Supp. 650 (S.D.N.Y. 1969), *aff'd* 435 F.2d 213 (2d Cir. 1970), *cert. denied* 404 U.S. 872 (1971), a holding the Government liable for the grounding of an oil tanker caused by an off-station buoy; *Richmond Marine Panama S.A.* v. *United States,* 350 F.Supp. 1210, 1215-18 (S.D.N.Y. 1972), holding the Government liable for its negligent failure to maintain a buoy on station; *Universe Tankships, Inc.* v. *United States,* 336 F.Supp. 282 (E.D. Pa. 1972), holding the Government liable for mispositioning a buoy; *Somerset Seafood Co.* v. *United States,* 193 F.2d 631 (4th Cir. 1951), holding the Government contributorily at fault for failing to locate a buoy in proper position to mark a wreck.

The District Court's application of *Indian Towing* in this case was unduly restrictive. According to the District Court:

> "Applying *Indian Towing* to these facts, the Coast Guard had the duty to maintain the buoy or to warn of any interruption of service." (436 F.Supp. at 921)

While the Coast Guard has, of course, undertaken responsibility for these duties, the Court below was in error in concluding that its duties are so limited. Red Star submits that this Court should hold that having undertaken to establish and maintain an aid to navigation to mark the rock obstruction and to direct mariners to the safe water east of the rock, thereby engendering reliance on the aid, the Coast Guard also undertook the duty of employing the most effective aids reasonably available under the circumstances. The Coast Guard's duty was not just to maintain the buoy or to give general warnings of possible interruptions of service. Rather, having notice that the can buoy was inadequate to perform its intended function, and that more effective land-based stationary aids were available, the Coast Guard was under a duty to either replace or supplement the buoy with those other available aids, particularly in view of the fact that the incredible history of casualties at this rock obstruction in which a pattern is obvious and in which the obscuring by ice of this buoy has played such a substantial part has conclusively shown the can buoy's ineffectiveness at this location.

While it is true the Government enjoys executive discretion in deciding whether to establish aids to navigation, it is equally true that once it takes steps to establish a system of aids to mark an obstruction and thereby engenders reliance on that system, it may not claim the discretionary right to leave in place what it knows to be an ineffective aid. The reason for this, as this Court has long recognized, is that in the absence of suspicious circumstances, navigators are entitled to rely upon aids to navigation established by the Government. *See Afran Transport Co.* v. *United States,* 435 F.2d 213, 215 (2d Cir. 1970), *cert. denied* 404 U.S. 872 (1971); *Russell, Poling & Co.* v. *Conners-Standard Marine Corp.,* 252 F.2d 167 (2d Cir. 1968). *See also Trinidad Corp.* v. *S.S. Sister Katingo,* 280 F.Supp. 976 (S.D.N.Y. 1967); *American Zinc Co.* v. *Foster,* 313 F.Supp.

671, 683 (S.D. Miss. 1970), *mod. on other grounds* 441 F.2d 1100 (5th Cir. 1971), *cert. denied* 404 U.S. 855; *Universe Tankships, Inc.* v. *United States,* 336 F.Supp. 282, 294 (E.D. Pa. 1972).

In view of the right of navigators to rely on Government established aids to navigation—that is, after all, why they are established—the Government's duty is not so limited as the District Court held. As the United States Supreme Court stated in *Indian Towing, supra:*

> "[I]t is hornbook tort law that one who undertakes to warn the public of danger and thereby induces reliance must perform his 'good Samaritan' task in a careful manner." (350 U.S. at 64-65)

In *Greer* v. *United States,* 505 F.2d 90, 1975 A.M.C. 195 (5th Cir. 1975), a fishing boat collided with a jetty. The court found that the Coast Guard's negligence in the maintenance of a buoy marking the jetty was the cause of the casualty, and held the Government liable for the vessel's damages. At the time of the accident, the jetty was submerged by heavy seas. A buoy designed to mark the jetty was some 500 feet off its charted position. Coast Guard records showed that the buoy had a history of going off-station, and had been found off its charted position four times during the period 1968-1972. Further, there was testimony by the Coast Guard Chief of the Aids to Navigation Division that the buoy could have been stabilized had additional weights that were available been utilized. In addition, there were discussions within the Coast Guard about relocating the buoy so that it would not drift even in extreme weather conditions, but no significant action had been taken.

In view of these facts, the Court in *Greer* held that the cause of the casualty was the negligence of the Coast Guard. The Court found that under *Indian Towing,* the

Coast Guard had failed to perform its duty to take steps to correct a known, dangerous condition:

> "Given this factual basis, the court found that the Coast Guard was negligent. Since it had exercised its discretion to place a buoy marking the jetty location, it had a duty to properly maintain it, including taking reasonable steps necessary to keep it on station once it had been discovered that it was not staying on station. *Indian Towing Company* v. *United States,* 1955, 350 U.S. 61, 1956 AMC 27. The government argues that *Indian Towing* places only an alternate duty on the Coast Guard, namely to either properly maintain its equipment or to properly warn of a malfunction. We do not read *Indian Towing* as authority for absolving the Coast Guard of its duty to correct a potentially dangerous condition merely by giving notice that such a condition exists, although adequate warning may absolve the Coast Guard from liability in particular situations. *See, e.g., De Bardeleben Marine Corp.* v. *United States,* 5 Cir. 1971, 1971 AMC 2131, 451 F.2d 140. Furthermore, we are not convinced that the warning which the government argues should be adequate here is sufficient to relieve it of the responsibility to correct the recurrent dislocation of buoy 7. * * *" (505 F.2d at 92)

See also Humble Oil & Ref. Co. v. *Tug Crochet,* 422 F.2d 602, 607 (5th Cir. 1970), where, in excusing the Government from any liability for a collision because it was not on notice that a lighted buoy it had put in place to mark a wreck was not operating, the Court stated:

> "Any liability of the United States must necessarily have been predicated upon proof that the accident was caused by its failure to use due care in buoy placement and maintenance or *by its lack of due care in allowing a defective buoy to remain on station for*

an unreasonable time after actual or constructive notice of such defect." (Emphasis supplied)

In the instant case, despite its knowledge that the buoy was not an effective aid in winter months for northbound vessels, and despite reasonable alternatives Coast Guard officers agreed at trial would be more effective, the Coast Guard failed to take steps to alleviate the hazard. Red Star submits that the policy which provides the Government with executive discretion to establish aids to navigation does not entitle the Government to maintain aids it knows are inadequate to carry out their intended function. While, as the District Court concluded (436 F. Supp. at 922), it may not have been negligent *per se* for the Government to establish a can buoy to mark Coast Guard Rock, it was negligent for the Government to fail to make use of other available aids which would have corrected the known deficiencies of the buoy.

It bears emphasis that the duty Red Star believes this Court should hold the Government undertook in maintaining an aids to navigation system to mark the rock obstruction is not that of an insurer who guarantees safe navigation on the Hudson River. It is well settled, however, that "the Suits in Admiralty Act, under which this complaint was filed, equates the standard of duty owed by the Government to that of a private person in like circumstances." *Canadian Pacific (Bermuda) Ltd.* v. *United States,* 534 F.2d 1165, 1168 (5th Cir. 1976).[8]

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[8] In the cited case, the question before the Court was the extent of the duty owed to navigators by the Corps of Engineers in regard to the existence of shoaling conditions in navigable waters. Because the Government had no prior knowledge of the shoal which caused the accident, the Court held that it had not violated its duty to exercise due care. *Canadian Pacific* is therefore distinguished from the present case, in view of the undisputed evidence of the Goverment's actual knowledge of the inadequacies of can buoy "25" and the availability of more reliable aids.

In *Guinan* v. *Boston, Cape Cod & New York Canal Co.,* 1 F.2d 239, 244-45 (2d Cir. 1924), this Court considered the duty of a private owner of a navigable channel in regard to marking obstructions. There the Court stated:

> "Inasmuch as the Canal Company is not an insurer that its canal is at all times in such condition as to render navigation thereon safe, and as it is only subjected to the duty of taking reasonable care that those allowed to navigate it may do so without danger, the burden of proof is on libelants to show a breach of this duty.
>
> The libelant, as pointed out, charged the Canal Company with negligence, because it permitted the canal to remain in a condition unsafe and unfit for the passage of vessels. * * *
>
> In the instant case the accident was caused by an obstruction. The evidence does not disclose what that obstruction was. No one ever saw it, or knows from whence it came, or whither it disappeared. Whatever it may have been, it was not an obstruction placed in the canal by the respondent, and its presence in the canal was not known to anyone until the accident happened. What possible precautions against its sudden appearance in the canal could the respondent have taken, and failed to take? *Unless the respondent failed to take some precaution, which it was its duty to take, there is no liability.* Unless the libelants can point out that the respondent could have prevented this accident, it had taken such reasonable precautions, as it was its duty to take, there is no liability."

Whereas the canal owner in *Guinan* was excused from any liability because it did not know of the presence of the obstruction, and thus could not take reasonable precautions, in the present case the Coast Guard not only knew of the exact location of the rock and the danger it presented, but

was well aware of the inadequacies of the precautions they had undertaken to mitigate the danger. While the Government was clearly not obligated to guarant e safe passage in the area of the rock, it was, by virtue of the reliance engendered by its aids to navigation system, obliged to exercise due care. This it failed to do.

In finally concluding that the Government exercised due care in continuing to maintain an aid to navigation it knew was inadequate to mark the rock, the District Court stated:

> "Although at the time of the accident the location was not considered to have a high priority among Hudson River sites needing additional aids to navigation, some consideration was given to the situation by the Coast Guard's officials. Evidence as to the cost and feasibility of aids to navigation other than a buoy at this location persuades the Court that the Coast Guard used due care in its decision to mark the reef in the winter of 1974 with a black can buoy. The Coast Guard weighed the need for some other aid to navigation against the costs of various fixed lights, constructions on the pinnacle or its demolition. It also considered the ecological problems in establishing shore based aids, the priority needs of other, more dangerous locations and the funds available." (436 F.Supp. at 922)

There is *no* support in the Record for this finding, and it is clearly erroneous. The testimony of Captain Glass, who was the Chief of the Aids to Navigation Division for the Third Coast Guard District in 1974, and of his successor, Captain Hallock, clearly shows that prior to the grounding of the Barge NEW LONDON in February, 1974, the Coast Guard *never* "weighed the need" for another aid to navigation in that location, and *never* considered the possibility of constructing either range lights on the eastern shore of the River or the installation of a red sector on Con Hook Light.

Captain Glass' testimony was clear on this subject:

> "Q. Captain, did the Coast Guard ever consider establishing a new aid at or near the rock presently marked by the 25 buoy?
> A. No." (528a)

When the District Court later asked Captain Glass whether the Coast Guard had ever considered installing a sectorized light or a range light in the vicinity of the rock, the answer was equally clear:

> "The Court: Any consideration ever given to putting in a sectorized light or a range light at that area?
> The Witness: I think there has been some current consideration within the last four or five months that I know of, but again, I believe this was in direct response to questions which were posed in the course of taking depositions.
> The Court: I am obviously not talking about how it arises when you are asked about it.
> Has the Coast Guard, its responsibility for aids to navigation, considered a project to install such aids at that site?
> The Witness: Not as a project, your Honor. Nothing more than a conversation." (530a-531a)

Captain Hallock confirmed Captain Glass's testimony in testimony quoted above that the Coast Guard had not considered either a red sector on Con Hook Light or range lights. (458a-461a)

Contrary to the District Court's finding that the Coast Guard "weighed the need" for some other aid at that location in view of the inadequacy of the black can buoy, the record is clear that despite the major groundings at Coast Guard Rock long before the one at issue in this case, and despite the Coast Guard's actual notice that the buoy

was frequently obscured by ice in winter months, no consideration was given to the problem.

The Coast Guard was fully aware of the possible consequences of its inaction beginning at the latest in 1963 when the Coast Guard Cutter SAUK went aground on the rock in circumstances similar to those which resulted in the grounding of the NEW LONDON. In the aftermath of that incident, the Coast Guard Review Board made an *internal* recommendation that consideration be given to the installation of a red sector light on Con Hook Light. (See Exhs. 28, 29 and 33). It is unknown what became of this recommendation, and the Government produced no evidence at trial to indicate what, if any, official consideration was given to this alternative.

Similarly, after the Coast Guard Cutter SASSAFRASS grounded on the rock in 1969, albeit under different circumstances than those attending the NEW LONDON incident, there were again internal discussions within the Coast Guard about the possibility of taking steps to remove the hazard. Captain Glass testified that he was aware of the existence of an undated draft letter prepared by an unknown writer concerning a request that the Army Corps of Engineers consider the possible removal of the pinnacle of the rock. (526a) His testimony was entirely inconclusive, however, as to whether this draft letter was ever sent, and the Government produced no evidence which indicates that any serious consideration was ever given to this alternative.

There was similar very vague testimony by another Government witness, Edwin C. Wortmar, of the Army Corps of Engineers. Mr. Wortmar stated that he vaguely recalled "hearing" about a recommendation concerning removal of the rock, but was unable to say from whom it came, who received it, when it was received, and what, if anything, was done. (756a-759a)

Captain Glass also testified that there had been a general consideration of the possibility of requesting the Army Corps of Engineers to deposit rip-rap, or rock debris, at various sites along the Hudson to build up bases for lighthouses which are in wide use in the Hudson River. Again, however, his testimony was that "Coast Guard Rock" was never specifically considered, and that, indeed, the proposal was apparently never carried out. (536a-539a; 541a-547a)

There was some testimony by Captain Glass about the cost of various fixed lights on the rock itself, construction on the pinnacle, or its demolition, as well as the *current* ecological problems that might be considered in establishing shore-based aids such as a range light. (526a; 532a; 563a-565a) The Record leaves no doubt, however, that *none* of these factors was ever weighed by the Coast Guard with respect to "Coast Guard Rock" prior to the grounding of the NEW LONDON.

Captain Glass' testimony about "ecological considerations" demonstrates the point. After his testimony that range lights could be constructed on the eastern shore, Judge Goettel asked Captain Glass:

> "The Court: How about ecological considerations? Would you get into any trouble from the good burghers of the area?
>
> The Witness: It depends who owns that hill. I might run into some problem with parks aspect of it, using part of the park area.
>
> There would have to be a cutting of trees and there would be a problem in that if you were to construct a range there, you would have to put the front range close to the pinnacle or do something with the candle power of the back range. You must have candle power between the front and rear range.
>
> So, I would say it would be very difficult to use the

present obstruction light[9] on the present structure on Sugarloaf Hill. It would be probably simpler to put a two-structure range or single structure range down lower on the hill closer to the shore, but as I say, there is no demonstrated need for a range * * *." (600a)

As this testimony clearly shows, prior to the grounding in question, and indeed as of the date of trial, the Coast Guard had never studied the ecological problems that might possibly have been involved in installing an effective land based aid (or, for that matter, of leaving the can buoy in place, with the resulting oil spill in the present case and two later incidents).

Contrary to the District Court's finding, the Coast Guard also considered the funds available. The testimony of Captains Glass and Hallock leaves no doubt that the matter of whether funding was available for shore based range lights or a red sector on Con Hook Light was never reviewed by the Coast Guard. (526a; 528a; 530a-531a; 533a; 563a-565a) Moreover, Captain Glass admitted that the installation of a steering light on Sugarloaf Hill on the east side of the channel would not be an expensive undertaking. (611a-612a). This was also confirmed by Captain Hallock who agreed that a range could be constructed and stated that the cost would be in the neighborhood of $3,000-$16,000.

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[9] Captain Glass later conceded that he was incorrect in his assumption that there was already a light on Sugarloaf Mountain. See 611a.

POINT II

The Government's failure to maintain a more effective land-based aid to navigation was a proximate cause of the grounding.

In the alternative to its erroneous conclusion that the Government was not negligent in the maintenance of aids to navigation in the area of the grounding, the District Court held that even if there was any negligence on the part of the Government, this was not a proximate cause of the grounding. (436 F.Supp. at 922) As will be shown, however, the District Court's conclusion was based on a fundamental misapplication of the concept of "proximate cause".

The evidence fully supported the District Court's finding 48 that the inadequacy of the can buoy on the night in question was a contributing cause of the grounding. (145a-146a; 126a) In Finding 48, the Court stated:

> "The obscuring of the buoy by ice contributed to the grounding in that if the buoy had been visible it would have indicated to Reimer he was off course and to the west of the channel." (436 F.Supp. at 914)

Notwithstanding this correct fact finding, the District Court erroneously concluded that the ineffectiveness of the buoy was not a "proximate cause" of the casualty. According to the District Court:

> "While the plaintiffs contend that the inability to locate the buoy was the proximate cause of the grounding, it is clear that the errors of navigation were the proximate cause. The obscured buoy was merely a 'but for' factor which, had it been visible, might have corrected the navigational errors. It cannot be said, therefore, that inability to use the aid was the proximate cause of the accident." (436 F.Supp. at 916).

This conclusion is obviously completely inconsistent with the District Court's fact finding, and should be set aside by this Court. In an analogous context, this Court recently rejected such a restrictive formulation of "proximate cause" and the "cause"/"condition" distinction implicitly applied by the District Court. In *Complaint of Tug Helen B. Moran, Inc.*, 560 F.2d 527, 528 n.3 (2d Cir. 1977), quoting Dean Prosser, the Law of Torts 247-48 (1971), the Court stated as follows:

> "Many courts have sought to distinguish between the active 'cause' of the harm and the existing 'conditions' upon which that cause operated. If the defendant has created only a passive, static condition which made the damage possible, he is said not to be liable. But so far as the fact of causation is concerned, in the sense of necessary antecedents which have played an important part in producing the result, it is quite impossible to distinguish between active forces and passive situations, particularly since, as is invariably the case, the latter are the result of other active forces which have gone before. If the defendant spills gasoline about the premises, he creates a 'condition'; but his act may be culpable because of the danger of fire. When a spark ignites the gasoline, the condition has done quite as much to bring about the fire as the spark; and since that is the very risk which the defendant has created, he will not escape responsibility. Even the lapse of a considerable time during which the 'condition' remains static will not necessarily affect liability; one who digs a trench in the highway may still be liable to another who falls into it a month afterward. 'Cause' and 'condition' still find occasional mention in the decisions; but the distinction is now almost entirely discredited. So far as it has any validity at all, it must refer to the type of case where the forces set in operation by the defendant have come to rest in a position of apparent safety, and some new force intervenes. But even in such cases, it is not the distinction between 'cause' and 'condition' which is important, but the nature of the risk and the character of the intervening cause."

In addition to its erroneous conclusion that the obscuring of the can buoy, while it contributed to the grounding, was not a "proximate cause", the Court below further incorrectly concluded that the Government's negligence in failing to install available land-based aids that would have prevented the grounding was likewise not a "proximate cause" of the incident. Citing this Court's decision in *American Smelting and Refining Co.* v. *S.S. Irish Spruce,* 548 F.2d 56, 60 (2d Cir. 1977), *cert. denied* —— U.S. —— (1977), the District Court held that:

> "There is a further reason for refusing to find the Coast Guard liable for this accident. Reimer had available for navigational purposes both radar, which could take bearings and ranges on prominent objects (such as Bear Mountain Bridge) and the Con Hook Light, on which a visual bearing could have been taken. Nevertheless, he strayed west of the channel looking for an obscured buoy. The premise that the presence of additional aids might have assisted in correcting his navigational error would be a 'fortuity [having] nothing to do with proximate cause. Liability must rest on causal relationship between the negligent aspect of the conduct and the harm resulting from the conduct.' *American Smelting and Refining Co.* v. *S.S. Irish Spruce,* 548 F.2d 56, 60 (2d Cir. 1977). It cannot be said, therefore, that the negligence, if any, of the Government in not establishing more effective aids to navigation was the proximate cause of the grounding."

Red Star has no quarrel with the concept of proximate cause quoted by the District Court. When this basic principle is properly applied to the facts, however, it is mani-

fest that the Court below erred in excusing the Government from liability for the grounding.

The District Court apparently believed that the question of whether the installation of a more effective, land-based aid to mark the rock would have prevented the grounding called for guesswork in which it was unwilling to indulge. The evidence presented at trial, however, left no doubt that there was no need for speculation, and that the presence of range lights on the eastern shore of the River, properly maintained by the Coast Guard on the night of the grounding, would have prevented the harm that resulted from their absence. Indeed, the District Court's Findings 48, 55 and 56 can support no other conclusion.

The District Court's reference to "available" aids, including radar and Con Hook Light, highlights the error in its ultimate conclusion. While it is true that Reimer had radar available to him, the District Court's hypothesis that (1) since this aid was available but did not prevent the grounding, (2) the presence of land-based range lights or a steering light also would not have prevented the grounding, obviously does not bear analysis. The fact that Reimer's use of the Tug's radar, as well as its powerful spotlight, did not assist him in locating the ice-covered buoy or in establishing his correct position in the River is hardly a basis for concluding that had there been an effective aid to navigation available to him he would not have made use of it to avoid the rock. Indeed, Reimer's testimony clearly shows that he was making use of every available aid to locate the rock, and it is not speculation to recognize that he would certainly have used range lights had they been in place and noted on the chart which was in use in the pilothouse. (197a)

Reimer's testimony was that as he passed under Bear Mountain Bridge and approached Con Hook Island, he was using the Tug's radar to locate his position. Indeed, the District Court so found in Findings 26 and 32:

"[26] At this time the Tug's radar was operating

and in use . . . [Reimer] was using his radar from time to time to confirm his visual sightings and to locate aids to navigation and other points of reference ahead. At all times the Tug's radar, steering system and engine controls were operating properly;

* * *

[32] As the Tug and her Tow passed abeam Mystery Point, Reimer did not locate the '25' can buoy either visually or on the radar. Because the said buoy marks a dangerous obstruction as well as a bend in the channel, Reimer reduced engine speed, turned on the Tug's powerful spotlight to illuminate the area ahead, and continued to search for the buoy visually and by radar." (19a-22a; 436 F.Supp. at 912-13)

Despite his use of the Tug's radar as he approached buoy "25", Reimer was unable to locate the buoy because it was under the ice. Moreover, it is apparent from his testimony that the radar returns he was receiving gave him a misimpression as to his actual location in the River. With the massive ice buildup on the bank above Mystery Point showing on the radar scope as shoreline, Reimer believed he was much closer to the eastern bank than he actually was. (24a; 188a-189a)

The District Court's suggestion that Reimer *could* have used the radar to "take bearings and ranges on prominent objects (such as Bear Mountain Bridge)" (436 F.Supp. at 922) fully shows the value range lights maintained by the Coast Guard on the eastern shore would have had at that dangerous turn in the River. The Court's suggestion in this regard was based on testimony at trial by the Tug's Captain John Kiernan to the effect that Reimer could possibly have taken a bearing on Bear Mountain Bridge, which was well behind him at that time, to have located his actual position in the River. (410a-411a)

Reimer himself admitted afterwards that he could have taken a distance from Bear Mountain Bridge with the Tug's

radar (190a), but did not recall whether in the circumstances, with his preoccupation in finding the buoy, he had looked back down the river to make use of the Bridge. (198a). Although it apparently did not occur to Reimer that he could look behind him and attempt to take a bearing on Bear Mountain Bridge to find his position, this is hardly a basis for concluding that had the Coast Guard exercised due care and installed range lights on the eastern shore across from buoy "25" to guide mariners away from Coast Guard Rock, Reimer never would have used them to avoid the obstruction.

Red Star submits that even if Reimer was at fault in failing to recognize that he could possibly have estimated his position in the River by lining up on Bear Mountain Bridge, this fault would have been alleviated entirely had the Government exercised the due care required of it in view of the known inadequacy of the can buoy and established range lights to direct northbound navigators to safe water away from the rock obstruction.

The District Court's further suggestion that a visual bearing could have been taken on Con Hook Light is likewise a form of second guessing that is not supported by the evidence. Reimer's testimony was that he did not see Con Hook Light prior to the grounding, and the Court so found in Finding 45. (436 F.Supp. at 914; 196a-197a) While Captain Kiernan saw the light when he arrived in the pilothouse shortly *after* the grounding (374a), this does not prove that Reimer either could or should have seen it as he approached the rock, especially in view of the fact that he was farther to the west side of the channel than he believed he was. Although there was testimony by Coast Guard witnesses to support the Court's Finding 28 (666a) that Con Hook Light is visible to a tug from the town of Manitou about 1.3 miles south, there was also expert testimony by Captain Fraccaro, an experienced Hudson River pilot, that the light is difficult to see from a tug, and is often obscured

from view on a northbound approach. Captain Fraccaro testified:

> "Well, sir, this is your problem with your Con Hook Light now. When you are coming southbound, from West Point, and you get here, Lady Cliff or Highland Falls, you steer right on that light and it is very good and you clear Con Hook and Mystery Point and you are all set, *but when you are coming north, the light is in the middle of the island and you won't see it on a tug and a barge until it is too late to do you any good.*
>
> Q. In your opinion, is Con Hook beam an effective mark for the rock south of it, an adequate mark for the rock south of it, in its present location?
>
> A. *It isn't any good to you the way it is now.* It doesn't serve the full purpose of the light the way it is now. It services you halfway only. Southbound, it is a beautiful light, northbound it is not that good for you, on a low elevation." (Emphasis supplied) (504a-505a)

Captain Fraccaro's testimony illustrates the fact that Con Hook Light is intended to service southbound rather than northbound vessels. It was not primarily designed to act as an aid to *northbound* vessels like the OCEAN PRINCE approaching the rock marked by buoy "25", and was not an alternative aid Mate Reimer could reasonably have been expected to look to under the circumstances to find the rock.

In any event, the District Court's hypothesis that (1) since Mate Reimer did not see Con Hook Light, (2) he would not have used range lights properly maintained by the Coast Guard on the eastern shore of the River to alert northbound navigators to the location of safe water east of the rock, quite simply fails to bear analysis.

Rather, the testimony at trial was unanimous that the presence of range lights on the eastern bank would have assisted Reimer in the circumstances. (See 767a; 770a) Unlike the situation presented in *The Irish Spruce, supra,*

where the vital information overlooked by the ship's navigator was on board in the 1969 Light List, such that the absence of the 1971 Light List containing the same information could not be considered the proximate cause of the stranding, in the present case, with the can buoy obscured by ice, there was no other effective aid to navigation available to Mate Reimer as he approached the buoy to indicate the location of the dangerous obstruction. Had there been properly maintained range lights or a steering light on the eastern bank to direct the navigator to safe water, or a red sector on Con Hook Light directed at northbound vessels, the grounding would not have occurred.

Red Star submits, therefore, that the Government's failure to maintain an aid to navigation that would have effectively marked the rock on the night in question was a cause of the grounding, and not, as the District Court held, just an attending condition which did not contribute to the casualty. *Compare Afran Transport Company* v. *United States,* 435 F.2d 213 (2d Cir. 1970), holding that the fault of the Coast Guard in failing to maintain a buoy on its charted position was the proximate cause of the grounding, and *Bouchard Transp. Co.* v. *Moran Towing & Transp. Co.,* 428 F.Supp. 153 (S.D.N.Y. 1977), holding that an off-station buoy was not a cause of the grounding.

Contrary to the District Court's conclusion, the premise that the presence of a more effecive, land-based aid might have prevented the casualty is not a mere "fortuity having nothing to do with proximate cause." The absence of an effective land-based aid was no less a proximate cause of the grounding than the errors in management on board the Tug the District Court attributed to Reimer.

Thus, the Court below held that:

> "Had Kiernan been brought to the wheel house, it is very likely he would have quickly detected that they were to the west of the channel and that the buoy was obscured by drifting ice." (436 F.Supp. at 917)

There is no different analysis involved in also concluding that had the Coast Guard maintained range lights on the eastern shore of the River to alert northbound navigators to the location of safe water, Reimer would have used the range lights and avoided the rock obstruction. Indeed, had the Government not failed to exercise the due care required of it, "the harm resulting from the conduct" would never have occurred.

Conclusion

The grounding was proximately caused by the negligence of the Government in the maintenance of aids to navigation in the area of the casualty.

The Court should reverse the District Court's dismissal of Red Star's claim against the Government for indemnity or contribution for the damages, if any, sustained by Pittston, and should direct the entry of judgment against the Government for at least fifty percent of the amount of damages Pittston is held to be entitled to recover from Red Sar. Alternatively, the action should be remanded for a determination of the amount of the Government's proportional fault.

Respectfully submitted,

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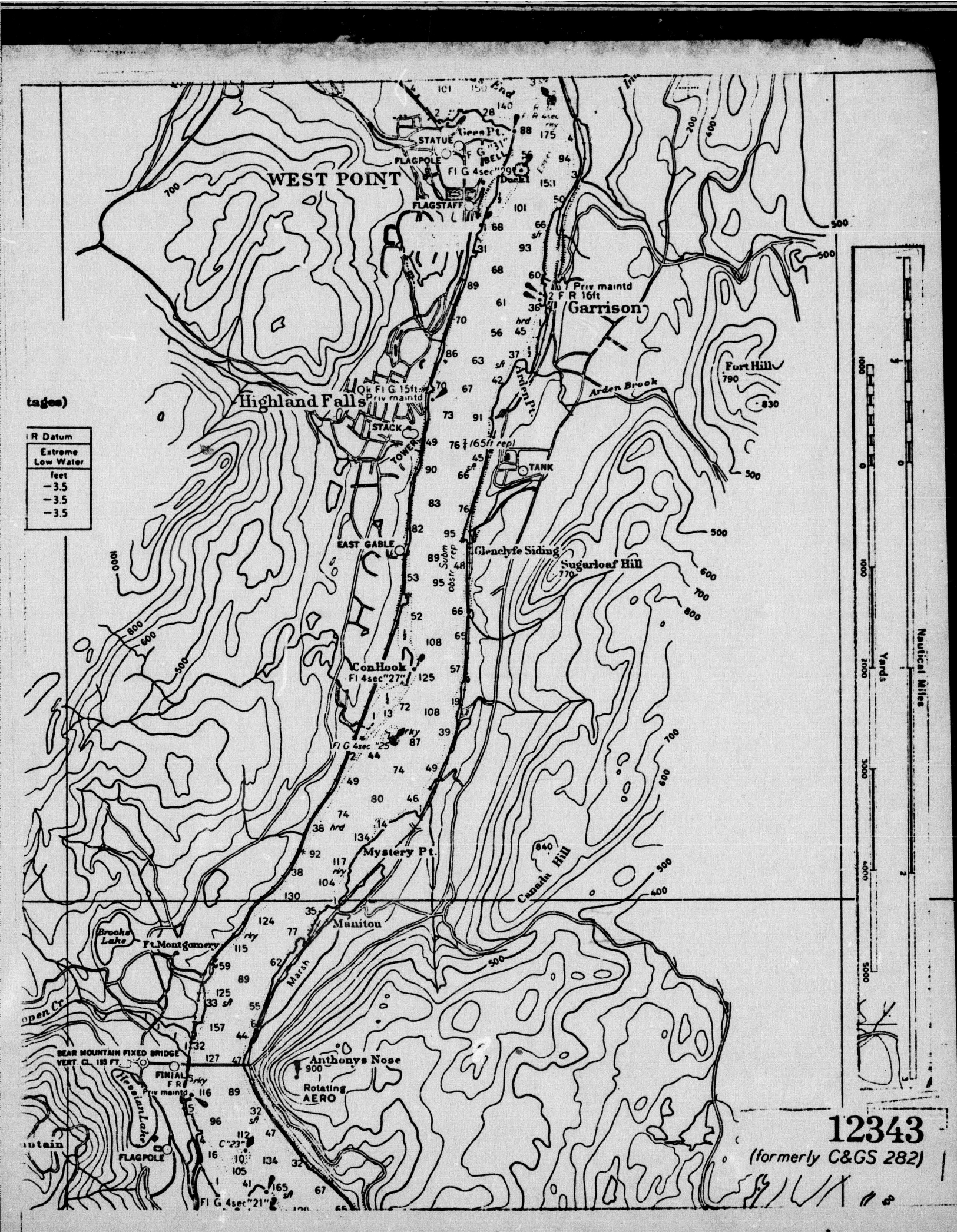
Addendum—Chart.

(See opposite ☞)


WEST POINT
Trophy Pt.
STATUE
FLAGPOLE
FLAGSTAFF
Fl G 4sec"29"
Bell
Priv maintd
2 F R 16ft
Garrison
Highland Falls
Ok Fl G 15ft
Priv maintd
STACK
TOWER
(65ft repl)
TANK
Indian Pt.
Arden Brook
Fort Hill
790
830
EAST GABLE
Glenclyfe Siding
Sugarloaf Hill
770
Subm obstr rep
ConHook
Fl 4sec"27"
Fl G 4sec"25"
Mystery Pt.
Canada Hill
840
Manitou
Brooks Lake
Ft Montgomery
Marsh
BEAR MOUNTAIN FIXED BRIDGE
VERT CL 135 FT.
FINIAL
F R
Priv maintd
Anthonys Nose
900
Rotating
AERO
Hessian Lake
FLAGPOLE
Fl G 4sec"21"
C"23"
tages)
R Datum
Extreme Low Water
feet
−3.5
−3.5
−3.5
Yards
Nautical Miles
12343
(formerly C&GS 282)

(62736)

375—Affidavit of Service The Reporter Co., Inc., 11 Park Place, New York, N. Y. 10007

United States Court of Appeals
For the Second Circuit

Complaint of Tug Ocean Prince

Plaintiffs Third Party Plaintiffs
Appellees Cross-Appellants

against

United States of America

Third Party Defendant-Appellee

AFFIDAVIT OF SERVICE

STATE OF NEW YORK,
COUNTY OF New York , ss:

Raymond J. Braddick, agent for Healy & Baillie Esqs. being duly sworn, deposes and says that he is over the age of 21 years and resides at 11 Park Place New York

That on the 3rd. day of March 1978 at 26 Federal Plaza New York, New York he served the annexed Brief upon Janice J. Sculmesiter Esq. in this action, by delivering to and leaving with said action true copy thereof.

DEPONENT FURTHER SAYS, that he knew the person so served as aforesaid to be the person mentioned and described in the said action

Deponent is not a party to the action.

Sworn to before me, this 3rd. day of March 19 78

Raymond J. Braddick

ROBERT W. JOHNSON
Notary Public, State of New York
No. 4509705
Qualified in Delaware County
Commission Expires March 30, 19